**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.**

S. B. CIVIL MISC. APPEAL NO. 435/2002

MRS. DINOO BUSSAR
v
RAJASTHAN STATE ELECTRICITY BOARD

Date of Judgment: 10th October, 2006

Hon'ble Mr. Justice R. S. Chauhan

Mr. Manu Bhargava, for the appellant.
Mr. G.C. Garg and
Mr. Virendra Lodha for the respondents.

By Court:

The appellant-defendant has challenged the order dated 1.9.99 passed by the Addl. District Judge No.2, Jaipur City, Jaipur whereby the learned Judge had dismissed the application filed by the appellant under Order 9 Rule 13 of the Civil Procedure Code (henceforth to be referred to as 'the Code', for short).

The brief facts of the case are that on 23.11.90, the respondent-plaintiff had filed a suit for recovery of Rs. 5,15,885.65/- paisa against the appellant-defendant. In the said suit the appellant Smt. Dinoo Bussar was arrayed as defendant. In the plaint, the address of the appellant was given as resident of M/s. Kawasji & Sons, 114, Post Office Road, Mahu (M.P.). When the notices were issued by the trial court, the notices were returned with a noting that

“there is no such partnership firm existing at the said address”. Subsequently, substituted service was permitted and a notice was published in a local newspaper on 4.5.92. However, despite the publication of the said notice, the appellant did not appear before the trial court. Hence, vide judgment dated 24.7.93 the suit was allowed ex-parte in favour of the plaintiff-respondent. It was not till 1996 that the appellant came to know about the ex-parte judgment and decree. It was only when the execution proceedings began in the Court at Mahu at M.P., in December, 1996 that the appellant came to know about the ex-parte judgment and the execution proceedings. Immediately in January, 1997 she filed an application under Order 9 Rule 13. However, vide order dated 1.9.99, the said application was dismissed. Hence this appeal before this court.

Mr. Manu Bhargava, the learned counsel for the appellant, has contended that the appellant was a partner in M/s. Mountabu Electric Supply Company. However, the said company was taken over by the State Government in 1975. Subsequently, the appellant had migrated to Switzerland where she is staying with her family. Since the appellant was residing in Switzerland, even after the publication of the notice in the local dailies at Mahu, she did not know that a civil suit is pending against her in the Court at Jaipur. Hence, the appellant has a sufficient reason for not attending the court. This aspect of the matter has been overlooked by the learned

Judge. Instead he has presumed that merely because the appellant was visiting India, she must have been told by her relatives about the pendency of the civil suit. According to the learned counsel such a presumption is not legally warranted.

On the other hand, Mr. G.C. Garg and Mr. Virendra Lodha, the learned counsel for the respondents, have vehemently argued that the appellant's nephew knew about the pendency of the case. Therefore, it can be reasonably deduced that the appellant knew about the said proceedings. Moreover, it is merely a delay tactic adopted by the appellant in order to wriggle out of her liability to pay a huge amount to the respondent.

We have heard the learned counsel for the parties and have perused the impugned order.

A bare perusal of the impugned order clearly reveals that the appellant's address is that of Switzerland. The learned Judge has ignored this aspect of the case. Although he has noticed that the appellant was residing in Switzerland, only on the basis that she was visiting India periodically, he has presumed that she might have knowledge about the pendency of the case. Such a presumption cannot be made as there is no evidence to buttress this presumption. Moreover, such a presumption is unwarranted by law.

The right to defend one's interest is not only part of the principles of natural justice but is also a right given under the Statute and also bestowed by the Constitution itself. Such a right should not be brushed aside lightly by the trial court. Under Order 9 Rule 13, the learned Judge was required to see if a sufficient cause existed for the non-appearance of the appellant before the trial court. Considering the fact that the firm was dissolved, the Mount Abu Electric Supply Company was taken over in the year 1975, considering the fact that the appellant had migrated to another country, even a publication in a National Newspaper would be unknown to the appellant. Hence, the appellant had sufficient reason for her non-appearance before the court. Thus a presumption cannot be drawn that it was within her knowledge that the civil suit was pending against her. As soon as the appellant came to know in 1996 through the executing court at Mahu (M.P.), immediately she filed an application under Order 9 Rule 13 for setting aside the ex-parte judgment and decree. Thus, she was vigilant in defending her interest immediately after she came to know that a judgment and decree had been passed against her. Therefore, the conclusion drawn by the learned Judge that a delay tactic has been adopted by the appellant is unwarranted under the circumstances of the case.

Moreover, the learned trial court should remember that "justice should not only be done, but must appear to be done".

Hence, an opportunity of hearing should be given to the defendant. Order 9 Rule 13 grants ample power to the trial court to impose cost on the defendant, while setting aside the ex-parte judgment and decree. The said power could have been invoked by the learned Judge.

The Hon'ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy (AIR 1998 S.C. 3222) has held that " in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put-forth as part of a dilatory strategy the Court must show utmost consideration to the suitor." Thus, the court must lean towards granting an opportunity to the defendant to put forth his defence.

Therefore, in the interest of justice, we quash and set aside the order dated 1.9.99 and allow the application under Order 9 Rule 13 CPC. We also set aside the ex-parte decree dated 24.7.99 passed in civil Suit No. 338/1990 Rajasthan State Electricity Board Vs. M/s. Kawasji & Sons & Others. We further direct the appellant to appear before the trial court on 30.11.06. We also direct the appellant to deposit a solvent security of 50% of the recovery amount i.e. of Rs. 2,57,942.50/- in favour of the respondents. We further direct the

trial court to record the evidence on day-to-day basis and to conclude the trial within a period of six months from the first day of appearance of the appellant i.e. from November 30, 2006. The appellant and the other respondents are directed to cooperate with the trial court for an early decision of the case within the stipulated period of six months. With these directions this appeal is allowed.

(R.S. CHAUHAN) J.

MRG.